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Supreme Court of the United States

October Term, 1926.

J. P. LAWRENCE ET AL., APPELLANTS,

vs.

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, APPELLEE.

STATEMENT AND BRIEF OF APPELLANTS.

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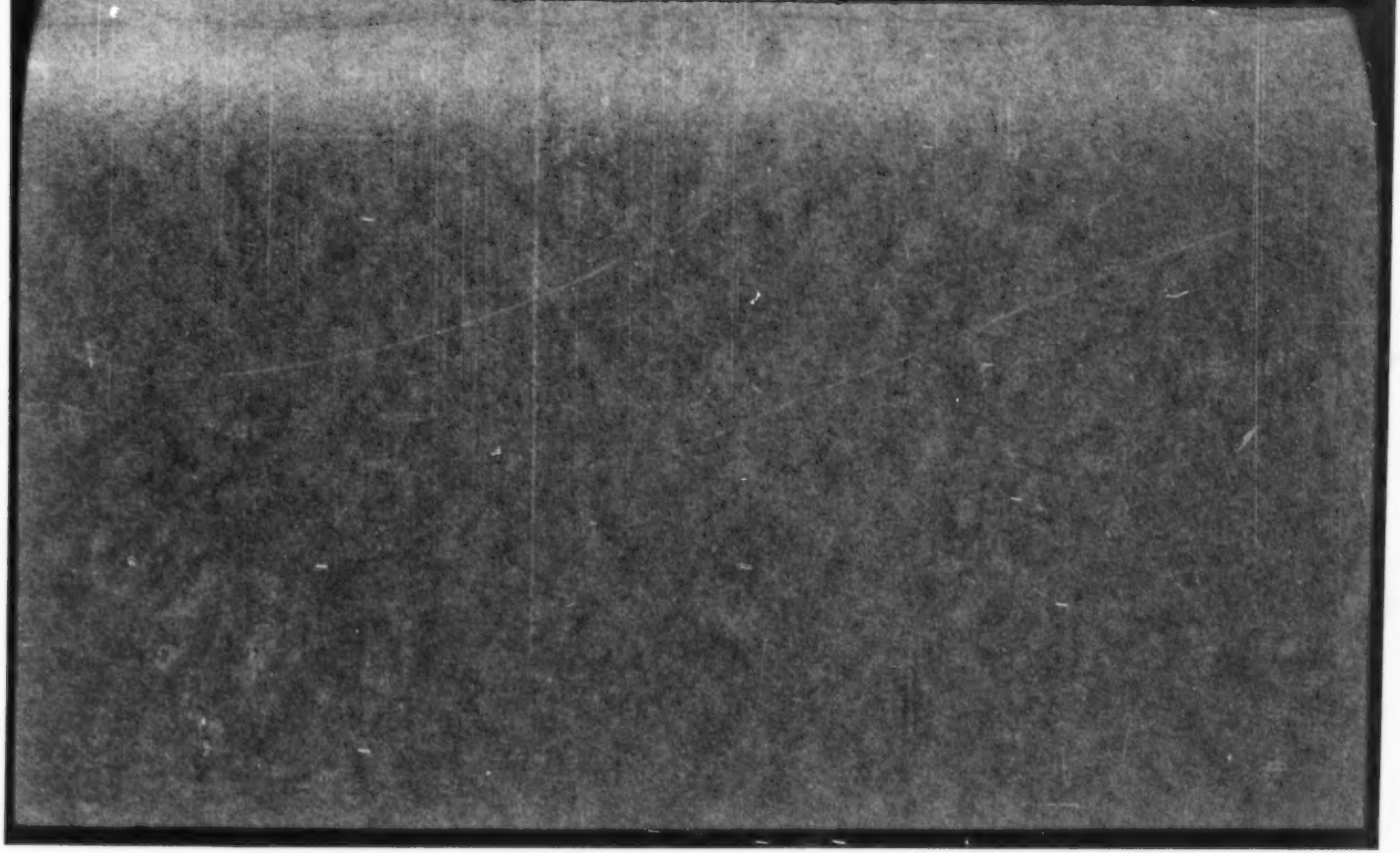

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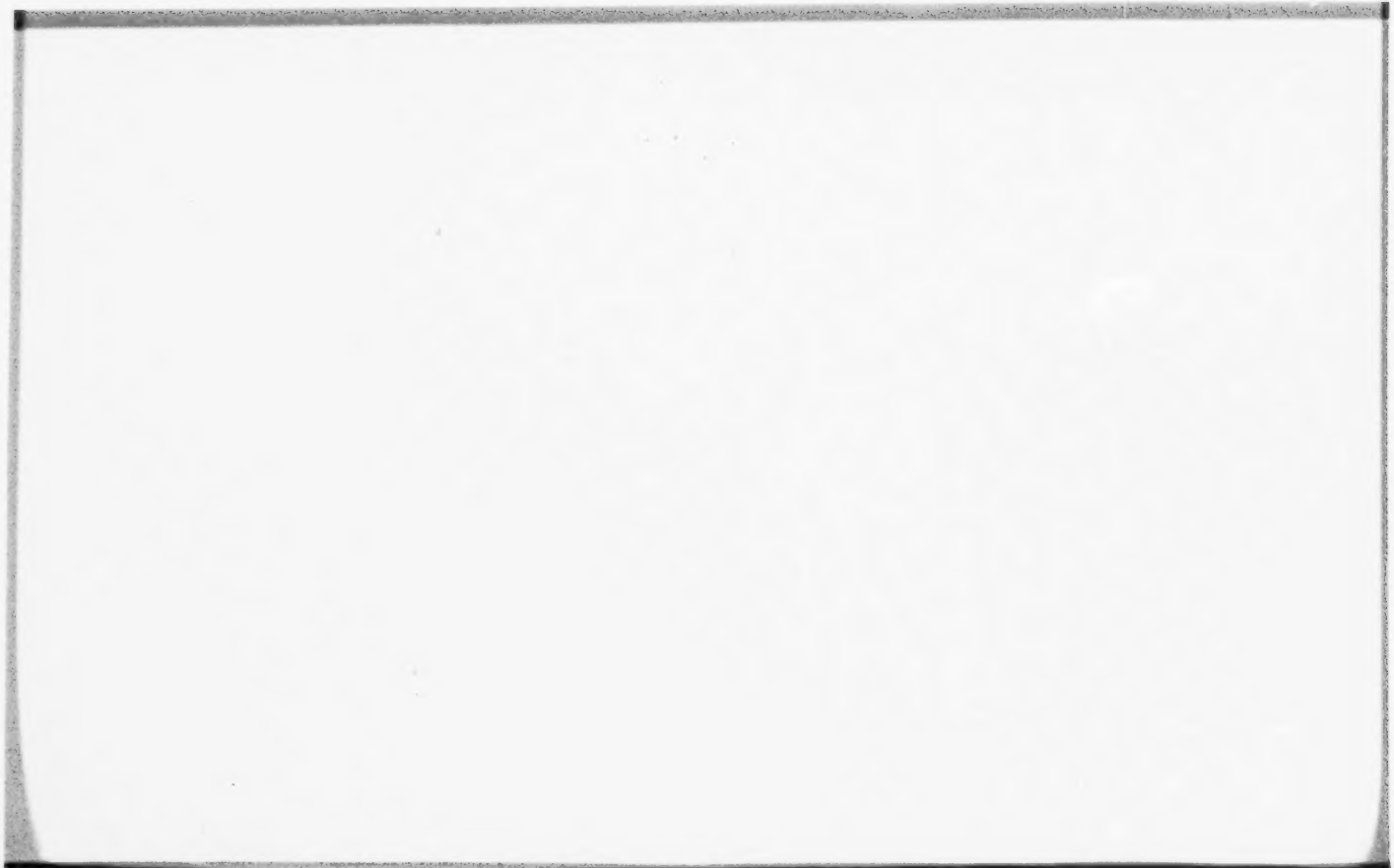

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NUMBER 894

STATEMENT AND BRIEF OF APPELLANTS.

STATEMENT OF THE CASE.

This is an appeal from the District Court of the United States for the Northern District of Oklahoma, where an interlocutory injunction was granted by a three Judge Court restraining officers of the State of Oklahoma from further proceeding under a statute of that State, which the Court held to be unconstitutional.

The suit was brought by St. Louis-San Francisco Railway Company, hereinafter referred to as the Railway Company, against J. F. Lawrence and C. C. Taylor, as citizens of the City of Sapulpa, Edwin Dabney, as Attorney General of Oklahoma, and Frank C. Carter, Fred

Capshaw, and C. C. Childers, individually and as members of the Corporation Commission of Oklahoma, to restrain them from taking any steps in a cause then pending in the Corporation Commission, or in any other proceeding, to enforce the provisions of the Shops and Division Point Act of the Oklahoma Legislature. This act provides that where railroad shops or division points have been located for a period of five years or more that the railroad company must not move them without the permission of the Corporation Commission. The three Judge Court held that this act of the Legislature was an unconstitutional interference with interstate commerce, and granted the interlocutory injunction. The history of the case is contained in the affidavit filed by the members of the Corporation Commission (R., p. 44). The proceeding before the Corporation Commission was commenced in February, 1917, at which time Messrs. Lawrence and Taylor filed application in the Commission seeking an order preventing the Railway Company from moving its shops and division point from Sapulpa to West Tulsa. Pending the hearing of the case the Commission entered a temporary order prohibiting the Railway Company from making the move until a hearing could be had. The petition was filed in the Commission before the passage of the Act of 1917. Messrs. Lawrence and Taylor offered their testimony in that case, but before the Railway Company's testimony was offered the Act of 1917

was passed, and thereafter no further proceedings were had of any kind, and the temporary order remained in force. In December, 1926, the citizens of Sapulpa, acting through Messrs. Lawrence and Taylor, filed a motion in the case pending before the Commission, setting out that, notwithstanding the previous temporary order, and notwithstanding the Act of the Legislature, the Railway Company was proceeding to move its shops and division point from Sapulpa to West Tulsa without securing the permission of the Commission, or making any application as required by the 1917 Act. Thereupon, the Commission issued a second temporary order prohibiting the removal and setting the cause for hearing in January of this year. The Railway Company thereupon, without appearing before the Commission or asking its permission in any way, brought this action and secured the interlocutory injunction.

The case was presented in the lower court on affidavits.

UNDISPUTED FACTS.

The undisputed facts disclosed by the affidavits of the appellants are as follows: The line of the Railway Company was originally built to and terminated at the Village of Sapulpa in the Indian Territory, about 1890. It crossed the Arkansas River and ran through the Arkansas valley bottom so as to reach the high ground at Sapulpa and

provide a shipping point for the cattle ranging in the Indian Territory south and west of the river. From that day to this Sapulpa has been a division point and the location of shops. In 1898 the line was extended from Sapulpa in a westerly direction to Oklahoma City. In 1901 the line was extended from Sapulpa in a southerly direction to the Red River. A little later a line was built from the west bank of the Arkansas River, at what is now West Tulsa, toward the northwest. West Tulsa is fourteen miles east of Sapulpa. It has been the practice of railroads to locate division points approximately one hundred miles apart. On the lines of this Railway Company Sapulpa has always been a division point; Oklahoma City, one hundred and two miles west, has always been a division point; Francis, one hundred and one miles south, has always been a division point, and Afton, eighty-nine miles east, has been a division point. Sapulpa has grown from a mere village to a town of approximately fifteen thousand people during these years, and its growth has been intimately connected with the business of the Railway Company. At this time the Railway Company has about seven hundred employees living in Sapulpa, about half of whom own their homes, many of whom have been employed by the Railway Company for many years, and approximately three thousand to thirty-five hundred of Sapulpa's people are these railway employees and members of their families. The contracts between the Rail-

way Company and the four Brotherhoods of Railway Employees are based on runs of one hundred miles. When the Railway Company extended its line south, Sapulpa vacated certain streets for its use, and the citizens secured seven miles of additional right-of-way with the understanding that the shops and division point should remain at Sapulpa. At various other times Sapulpa has vacated streets for the use of the Railway Company, each time with the understanding that the shops and division point should be retained. Sapulpa has at various times collaborated with the engineers of the Railway Company in building a suitable water supply system in order to provide suitable boiler water for the Railway Company's use, and has expended considerable sums of money at the instance of the Railway Company for this purpose, always with the understanding that the shops and division point should remain. The officials of the Railway Company have advised their employees to buy homes in Sapulpa and become active citizens of the community, always representing to them that the location of the shops and division point was permanent. The employees have acted on this advise and have taken an active part in the municipal government of the city, many of them at various times holding public office in the city, and there has always been a friendly co-operation between the inhabitants of the city, the railway employees and the Railway Company. Sapulpa is a healthy city, well supplied with

modern conveniences, and the Railway employees desire to remain there. West Tulsa is on the west bank of the Arkansas River, located on bottom lands subject to overflow. The Arkansas bottom lands extend from the river in a westerly direction for a mile or two to a range of hills, and flood waters remain stagnant on these bottom lands and make West Tulsa an unhealthy place and an undesirable place for the employees and their families to live in.

CONTROVERTED FACTS.

The affidavits of the Railway Company and of the appellants raise an issue as to whether, from a physical operating standpoint West Tulsa or Sapulpa is the most desirable location for a division point, the affidavits of the Railway Company being in favor of West Tulsa and those of the appellants in favor of Sapulpa. The affidavits of the Railway Company show that the business of the company can be conducted more economically by locating the shops and division point at West Tulsa, while the affidavits of appellants show that this economy is in favor of Sapulpa. The affidavits of the appellants emphasize the fact that on business originating south of Sapulpa and destined to the lines west of Sapulpa, and on business originating west of Sapulpa and destined to the lines south of Sapulpa, there is now a direct movement through Sapulpa, while if the division is moved to West Tulsa there would be a back haul on all such traffic—that

is to say, it would have to move into West Tulsa, a distance of fourteen miles, and back a distance of fourteen miles, involving a double haul of twenty-eight miles. The affidavits of the Railway Company do not controvert this fact, which is obvious.

THE STATUTE INVOLVED.

The Act of the Legislature of 1917, the validity of which is involved in this case, is contained in Sections 3482 to 3485, inclusive, of the Compiled Oklahoma Statutes 1921, and reads as follows:

> "3482. REMOVAL—PERMIT. That no person, receiver, firm, company or corporation owning, operating or managing any line of steam railroad in this State shall be allowed to remove railroad shops or division points which have been located at any place in this State for a period of not less than five years without previously securing the permission of the Corporation Commission to make such removal.
>
> "3483. CORPORATION COMMISSION—JURISDICTION. If, and when any such person, receiver, firm, company or corporation desires to remove any such railroad shops or division point described in Section One of this act, it shall be his duty to file an application with the Corporation Commission setting forth the present location of such shops or division point and the reasons for such removal, and thereupon the Corporation Commission shall have full power and jurisdiction to entertain such complaint, but before hearing the same or making any order permitting such removal to be made, said cause shall be set down for hearing, not less than ten days' notice shall be given the city, town or village in which or at which such shops or division point have been maintained and after giving all par-

ties interested a full and complete hearing in the premises the Commission may in its discretion permit or refuse such request for a removal.

"3484. HEARING—BEFORE CORPORATION COMMISSION. When an application is filed before the Commission for the removal of terminals or car shops, as provided in Section Two, the Commission shall hear evidence on the relative efficiency and expense of handling traffic through the proposed terminal as compared with the present facilities, and shall consider all other facts and circumstances affecting the various interests involved. In determining the adequacy of the present facilities the Commission shall consider the same increased by an expenditure equal to an amount necessary to remove the same to the proposed location or an amount equal to the necessary expenditure to establish such facilities at the new location. It is hereby further provided that the Commission shall hear evidence and shall make a finding of fact as to the sanitary and habitable conditions of the proposed location with reference to whether the same would endanger the health of the employees of the applicant or the health of their families. If the Commission should find that the sanitary or habitable conditions at the proposed location of said terminal facilities would endanger or injuriously affect the health of the employees of said applicant or their families, the Commission should deny said application and order the said terminal facilities and car shops to remain at the present location.

"3485. PROOF—BURDEN UPON APPLICANT. On any such hearing, as provided in this act, the presumption shall be against the removal, and the burden of proof rest upon the applicant to show that such removal ought to be made."

In the bill of complaint the Railway Company also quotes Section 5548 of the Compiled Statutes 1921,

but this section is not a part of the 1917 Act, was passed ten years earlier, and is not involved in this cause.

ASSIGNMENT OF ERRORS.

The errors assigned are:

1. The Court erred in granting the interlocutory injunction against the defendants in said cause.

2. The Court erred in holding that the Act of the Legislature of 1917, pleaded in the bill of complaint in said cause, is in violation of the Constitution of the United States, and void.

ARGUMENT.

First.

The Act of the Legislature is primarily designed to protect the health of railroad employees and their families.

Section 3482 provides that railroad shops and division points which have been located for as much as five years shall not be moved without the permission of Corporation Commission.

Section 3483 outlines the procedure before the Corporation Commission on applications for removal.

Section 3484 provides that when such an application is filed:

> "• • • The Commission shall hear evidence on the relative efficiency and expense of handling traffic through the proposed terminal as compared with the present facilities, and shall consider all other facts

and circumstances affecting the various interests involved * * *."

It further provides:

"* * * That the Commission shall hear evidence and make a finding of fact as to the sanitary and habitable conditions of the proposed location with reference to whether the same would endanger the health of the employees of the applicant or the health of their families * * *."

And the Commission shall deny the application if the removal "* * * would endanger or injuriously affect the health of the employees of said applicant or their families."

Section 3485 imposes the burden of proof on the railway company.

It is obvious that this statute is an exercise of the power of the State to protect the health of railroad employees and their families by preventing railroads from moving terminals which have been located for a long time into a new location which is unhealthy and which endangers the health and safety of railroad employees and their families. The act has no relation to the location of new division points or new shops. It only applies to those which have been voluntarily selected by the railway company, and which have been used for as much as five years. It does not prevent a change of location even under such conditions. It merely prevents a removal to an unhealthy

location. It does not affect the movement of interstate commerce or of intrastate commerce, except as this may be incidentally affected by preserving the health and safety of the employees. Assuming that the new location is a healthy one, it is obvious that it is the duty of the Corporation Commission to permit the move if "the relative efficiency and expenses of handling traffic through the proposed terminal" is an improvement.

A division point is merely a place where train crews change. There is nothing in this act affecting the use of division points. There is nothing which prevents through trains from moving through division points in any manner desired by the railway company. There is nothing in the act which requires a change of crews at any particular division point. In fact, the affidavits in this case show that the Frisco through passenger trains move through Sapulpa without changing crews. The division points have a more direct relation to the movement of freight and the long established custom of railroads has been to locate division points approximately one hundred miles apart, and contracts with the Brotherhoods are based on runs of one hundred miles. If it be desirable, as claimed by the railway company, to make longer divisions there is nothing in this act to prevent it. The only thing that this act prevents is the forced movement of railroad employees and their families into an unhealthy location, and the undisputed testimony disclosed by affidavits in this case is that

West Tulsa is an unhealthy location on account of its being in the Arkansas River valley bottom on land subject to overflow and where stagnant water stands for a long time.

Second.

A State may legislate to protect the health of railroad employees.

Legislation under the police power need not apply directly to every inhabitant of a state, but may apply only to those who come within the class affected. The power of governments, both national and state, to legislate in the interests of railroay employees has been too often exercised to admit of debate.

In *Napier* v. *Atlantic Coast Line Railway Company,* decided November 29, 1926, not yet officially reported (47 Supreme Court Reporter 207), the court at this term has specifically announced the rule here laid down. The question involved in that case was whether the Federal Locomotive Boiler Inspection Act had superseded a Georgia statute prescribing an automatic door to the firebox of engines, and a Wisconsin statute prescribing cab curtains for the use of engines. Prior to the enactment of the Federal Act similar state statutes have been held valid, but the court held in this case that the Federal Act had occupied the field and rendered state statutes on the same subject invalid. The opinion, however, lays down the rule defin-

itely for which we now contend, the court saying, at page 209 of the Supreme Court Reporter:

> "Each device was prescribed by the state primarily to promote the health and comfort of engineers and firemen. Each state requirement may be assumed to be a proper exercise of its police power, unless the measure violates the commerce clause."

And, again, on the same page the court says:

> "The requirements here in question are, in their nature, within the scope of the authority delegated to the Commission. An automatic fire door and an effective cab curtain may promote safety. Keeping firemen and engineers in good health, like preventing excessive fatigue through limiting the hours of service, clearly does so, although indirectly, and it may be found that to promote their comfort would likewise promote safety."

The state statutes involved in that case were held invalid, not because the state did not have the power to enact them. The power to enact them was clearly conceded. They were held invalid merely because the Federal Act had occupied the field, but the Court specifically recognized and asserted the doctrine that the state has power to legislate to promote the health and comfort of engineers and firemen—that is to say, a portion of the railroad employees.

Clearly, therefore, the state has power to legislate in the interest of the health of railroad employees and their families, and this act is valid exercise of the state's police power unless it comes into direct conflict with some act of Congress or with the Constitution.

Third.

There is no Act of Congress relating to the subject covered by this Act.

We state this point without argument. It is the mere statement of a negative. There is nothing in the Transportation Act or in any other act of Congress relating to the subject. There was no contention made in the lower court that there was any such Congressional legislation, and we assume that no such contention will be made here.

In *Railroad Commission of California* v. *Southern Pacific Company,* 264 U. S. 321 (The Los Angeles Union Station case), this Court recognized a much broader power as still left to State Commissioners when it said, page 345:

> "One might, too, readily conceive of railroad crossings or connections of interstate carriers in which the exercise by a state commission of the power to direct the construction of merely local union stations or terminals without extensions of main tracks and substantial capital outlay should be regarded as an ordinary exercise of the police power of the state."

In this quotation the court recognizes the existence, notwithstanding the Transportation Act, of the power of state commissions to direct the construction of "merely local union stations or terminals."

If this power is left in the state commissions there is certainly nothing in the Transportation Act which can in any way affect the act of the legislature now involved, as it requires nothing in the way of construction but merely

prevents the removal of division points and shops to an unhealthy location.

Fourth.

The Act here involved does not conflict with the commerce clause of the Constitution.

International & Great Northern Railway Company vs. Anderson County, 246 U. S. 424.

That case involved a number of points not material here. It did involve, however, the validity under the commerce clause of the Office-Shops Act of the Texas Legislature, and it held that that act was valid. We think that case is conclusive of the validity of this act. The act of the Texas Legislature involved in that case is described in the opinion of the court, at page 430, as follows:

> "Act, approved March 27, 1889, c. 106; Rev. Civil Stats. 1911, Sec. 6423, provided that every railroad company chartered by the State or owning or operating a line within the State should permanently maintain its general offices at the place named in its charter, and if no certain place were named there, at such place as it should have contracted to locate them, otherwise at such place as it should designate; also that it should maintain its machine shops and roundhouses at the place where it had contracted to keep them, and that if the offices, shops or roundhouses were located on the line of a railroad in a county that had aided such railroad by an issue of bonds in consideration of the location being made, then such location should not be changed; 'and this shall apply as well to a railroad that may have been consolidated with another as to those which have maintained their original organization.' A violation of the act entails

forfeiture of the charter, with a penalty of $5,000 a day for every day of violation."

We call attention to the fact that the Texas Act prohibited removal of general offices, machine shops and roundhouses. The Texas Act had no relation to the health of railroad employees, but was a prohibition against removal. The Oklahoma Act does not prohibit the removal of shops and division points, but provides a method for removal. The only circumstances under which a removal is prevented are when the health and safety of the railroad employees and their families are involved. If the Texas Act was valid, it therefore follows that there is no doubt about the validity of the Oklahoma Act, because if a state can prohibit the removal of shops without regard to the health of the employees, then it can certainly prevent the removal of shops to a place where the health of the employees and their families is threatened.

Again, in the Texas Act there was no provision for an inquiry by the commission. There was a mere prohibition against the removal, while in the Oklahoma Act the removal is permitted after an inquiry and upon a finding that the health of the employees is not endangered.

The Texas Act was attacked as a burden on interstate commerce, and this Court, in passing on that question, says (p. 433):

"The acceptance of the charter by the plaintiff in error disposed of every constitutional objection but

one. It is said that the restriction imposes a burden upon commerce among the States, since the road concerned has expanded and now is largely engaged in such commerce. The jury found that it imposed no such burden, upon an issue submitted to them in accordance with the desire of the plaintiff in error, although not in the form that it desired. So far as the question depended upon the testimony adduced the verdict must be accepted, and although no doubt there might be cases in which this Court would pronounce for itself, irrespective of testimony, whether a burden was imposed, we are not prepared to say that in this instance the State has transcended its powers."

We think this decision settles our case. We thought so when it was presented to the three judge court below, but that court for some reason did not see fit to follow the rule laid down by this Court. Any further debate on the point would seem to be entirely superfluous, but as we lost the case in the lower court by relying upon the decision of this Court, we have concluded to briefly call attention to some of the numerous decisions of this Court, upholding other state legislation much more nearly trenching upon a regulation of commerce, and this brings us to the next point.

Fifth.

Laws passed by a State in the exercise of its police powers are valid, even though they indirectly affect interstate commerce.

The principles involved are clear, and the only difficulty is in their application. The states within their proper sphere are sovereign. The United States within

their proper sphere are sovereign. Congress has the power to regulate interstate commerce. It was originally thought that until Congress acted, the state might act even in the regulation of interstate commerce. License cases, 5 Howard 504. But this doctrine was subsequently overruled in *Leisy* v. *Hardin,* 135 U. S. 100. Although in that case there was a very able dissenting opinion by Justices Gray, Harlan and Brewer, it may now be taken as a settled rule that state legislation must not regulate interstate commerce. On the other hand, the states never surrendered their police power to the United States. Their power to protect and preserve the health, the morals, the welfare and the safety of their people has never been surrendered. They may in the exercise of this power and in the absence of Congressional legislation absolutely prohibit interstate commerce. For example, the States may prohibit the importation of diseased cattle. *M., K. & T. R. R. Co.* v. *Haber,* 169 U. S. 613. They may prohibit the running of freight trains on Sunday. *Hennington* v. *Georgia,* 163 U. S. 299. Similar legislation has been sustained in a number of the cases hereafter cited. The real question for consideration in every case is whether the legislation of the state is reasonably related to its declared object. If it is, or if the question is fairly debatable, the act is valid. For example, this Court at this term in *Village of Euclid* v. *Ambler Realty Company,* decided November 22, 1926 (47 Supreme Court Reporter 114), says, page 118:

"If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control."

Again, at page 121, the court says:

"If these reasons, thus summarized, do not demonstrate the wisdom or sound policy in all respects of those restrictions which we have indicated as pertinent to the inquiry, at least, the reasons are sufficiently cogent to preclude us from saying, as it must be said before the ordinance can be declared unconstitutional, that such provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare."

Again, at this term the court said in *Graves* v. *Minnesota,* decided November 22, 1926, 47 Supreme Court Reporter 122:

"By enacting the present statute the State has determined, through its legislative body, that to safeguard properly the public health it is necessary that no one be licensed to practice dentistry who does not hold a diploma from a dental college of good standing. That determination must be given great weight. Every presumption is to be indulged in favor of the validity of the statute."

Again, at this term in *Mass. State Grange* v. *Benton,* decided November 23, 1926, 47 Supreme Court Reporter 189, the court, in upholding the daylight saving act, said:

"But it also went on the important rule, which we desire to emphasize, that no injunction ought to issue against officers of a State clothed with authority to enforce the law in question, unless in a case reasonably free from doubt and when necessary to prevent great and irreparable injury."

We do not think there is any doubt about the Oklahoma Statute being passed to protect the health and safety of railroad employees, and not as a regulation of commerce of any kind. It certainly cannot be said that it is clear that this is not so. It, therefore, follows under the rules laid down by this Court at this term that this injunction should not issue. The shops and division point in this case have been located at Sapulpa since the railroad was constructed, and to leave them there long enough for the railway company to apply to the commission for an order certainly would not have imposed on the railway company "great and irreparable injury." Having been there thirty-five years they might easily remain there three or four months longer without materially injuring the railway company.

Bearing in mind these rules resolving the doubt in favor of the statute, we call attention briefly to a number of cases in which state legislation has been sustained against an attack under the commerce clause.

In *The Mayor of New York* v. *Miln*, 11 Peters 102, in sustaining a statute of New York requiring a master of a vessel arriving from a foreign port to report to the Mayor an account of his passengers, the Court, in discussing the commerce clause, says (p. 139):

> "There is, then, no collision between the law in question and the acts of congress just commented on; and, therefore, if the state law were to be considered

as partaking of the nature of a commercial regulation, it would stand the test of the most rigid scrutiny, if tried by the standard laid down in the reasoning of the court, quoted from the case of Gibbons vs. Ogden.

"But we do not place our opinion on this ground. We choose rather to plant ourselves on what we consider impregnable positions. They are these: That a State has the same undeniable and unlimited jurisdiction over all persons and things within its territorial limits, as any foreign nation, where that jurisdiction is not surrendered or restrained by the constitution of the United States. That, by virtue of this, it is not only the right, but the bounden and solemn duty of a State to advance the safety, happiness and prosperity of its people, and to provide for its general welfare, by any and every act of legislation, which it may deem to be conducive to these ends, where the power over the particular subject, or the manner of its exercise, is not surrendered or restrained, in the manner just stated. That all those powers which relate to merely municipal legislation, or what may, perhaps, more properly be called internal police, are not thus surrendered or restrained; and that, consequently, in relation to these, the authority of a State is complete, unqualified, and exclusive.

"We are aware that it is at all times difficult to define any subject with proper precision and accuracy; if this be so in general, it is emphatically so in relation to a subject so diversified and multifarious as the one which we are now considering.

"If we were to attempt it, we should say that every law came within this description which concerned the welfare of the whole people of a State, or any individual within it; whether it related to their rights, or their duties; whether it respected them as men, or as citizens of the State; whether in their public

> or private relations; whether it related to the rights of persons, or of property, of the whole people of a State, or of any individual within it; and whose operation was within the territorial limits of the State, and upon the persons and things within its jurisdiction."

The Act of the Oklahoma Legislature certainly concerns the welfare of a portion of its inhabitants, that is to say, railroad employees, as it is designed to protect them from living in an unsanitary place, and in this particular case three or four thousand people are involved. The rule laid down in the above quotation with reference to the police power does not limit it to the whole people of a State, but likewise to "any individual within it." The State certainly has the right to legislate for the health of railway employes, and this specific point has been decided in a number of cases cited herein.

In *Smith* v. *Alabama,* 124 U. S. 465, the court sustained an Alabama statute requiring locomotive engineers to be examined and licensed by a Board appointed by the State.

In *Nashville, Chattanooga & St. Louis Ry.* v. *Alabama,* 128 U. S. 96, the court sustained a statute requiring locomotive engineers to pass an examination showing their ability to discriminate between colors, and requiring the railway companies to pay a fee for the examination.

In *Plumley* v. *Massachusetts*, 155 U. S. 461, a statute was sustained prohibiting the sale of oleomargarine artificially colored.

In *Western Union Telegraph Co.* v. *James*, 162 U. S. 650, a Georgia statute was sustained penalizing telegraph companies for negligent delay in delivering messages.

In *Hennington* v. *Georgia*, 163 U. S. 299, a statute was sustained prohibiting the running of freight trains on Sunday.

In *New York, New Haven & Hartford R. R. Co.* v. *New York*, 165 U. S. 628. a statute was sustained regulating the heating of steam passenger cars, although the argument was made that different States might prescribe different regulations, thereby stopping a train running through two or more States in order that the railroad might comply with conflicting regulations.

In *Chicago, Milwaukee & St. Paul R. R. Co.* v. *Solan*, 169 U. S. 133, an Iowa statute was sustained which provided that no contract shall exempt any railroad from the liability of a common carrier, even as applied to interstate commerce.

In *Missouri, Kansas & Texas Ry. Co.* v. *Haber*, 169 U. S. 613, a Kansas act was sustained prohibiting shipment into Kansas of diseased animals.

In *Patapsco Guano Co.* v. *North Carolina Board of Agriculture,* 171 U. S. 345, an act was sustained which provided for the inspection of fertilizer moving into the State in interstate commerce, and imposing an inspection fee.

In *Lakeshore & Michigan Southern Ry. Co.* v. *Ohio,* 173 U. S. 285, a statute was sustained requiring railroad companies to stop at least three of their trains at every town containing three thousand inhabitants.

In *Erb* v. *Morasch,* 177 U. S. 584, a city ordinance was sustained limiting the speed of interstate trains within the city limits.

In *Reid* v. *Colorado,* 187 U. S. 137, a statute was sustained prohibiting the introduction of diseased cattle or horses.

In *Crossman* v. *Lurman,* 192 U. S. 189, a New York statute was sustained prohibiting the sale of adulterated food and drugs, although moving in interstate commerce.

In *New Mexico* v. *Denver & Rio Grande R. R. Co.,* 203 U. S. 38, a territorial statute was sustained prohibiting a railroad company receiving for shipment beyond the limits of the territory, hides which had not been inspected.

In *Asbell* v. *Kansas,* 209 U. S. 251, a statute was sustained which prohibited the transportation of cattle into

the state from the south, except for immediate slaughter, which had not been passed as healthy by the proper state officials or by the National Bureau of Animal Industry.

In *Atlantic Coast Line Railroad Co.* v. *Mazursky*, 216 U. S. 122, a South Carolina statute was sustained requiring railroads within a specified time to settle claims for loss or damage to freight, even as applied to interstate shipments.

In *Western Union Telegraph Co.* v. *Commercial Milling Co.*, 218 U. S. 406, a Michigan statute was sustained fixing the liability of telegraph companies for non-delivery of interstate as well as intrastate messages.

In *Chicago, Rock Island & Pacific Ry. Co.* v. *Arkansas*, 219 U. S. 453, the full crew law was sustained as applied to interstate trains.

In *Western Union Telegraph Co.* v. *Crovo*, 220 U. S. 364, a Virginia statute was sustained imposing a penalty on telegraph companies for failure to perform a common law duty, even as applied to interstate messages.

In *Red "C" Oil Co.* v. *North Carolina*, 222 U. S. 380, an oil inspection statute was sustained as applied to interstate shipments.

In *Savage* v. *Jones*, 225 U. S. 501, an Indiana statute was sustained regulating the sale of concentrated commercial feeding stuff, as applied to interstate commerce, al-

though the Federal Food and Drugs Act was then in effect.

In *Grand Trunk Ry. Co.* v. *Michigan Railroad Commission,* 231 U. S. 457, an order of the Commission was sustained requiring certain railroads doing an interstate business to use their tracks within the city limits of Detroit for the interchange of intrastate traffic.

In *Atlantic Coast Line Railroad Company* v. *Georgia,* 234 U. S. 280, a statute was sustained requiring railroads to use locomotive headlights of specified form and power, although it was argued that different requirements might be passed by different states, thus requiring railroad locomotives to have different headlights on two sides of the imaginary state line.

In *Sligh* v. *Kirkwood,* 237 U. S. 52, a Florida statute was sustained prohibiting shipment of immature citrus fruits.

In *Armour & Co.* v. *North Dakota,* 240 U. S. 510, a statute was sustained requiring lard to be put up in pails containing a specified number of pounds, even as applied to shipments from other states.

In *Pure Oil Co.* v. *Minnesota,* 248 U. S. 158, a statute was sustained providing for the inspection of the illuminating oils and gasoline while yet in interstate transit, and imposing an inspection fee.

In *Merchants Exchange of St. Louis* v. *Missouri,* 248 U. S. 365, a statute was sustained which prohibited any person other than a duly authorized and bonded State Weigher, from issuing weight certificates for grain weighed at any warehouse or elevator where State Weighers were stationed, even as applied to interstate shipments.

In *Corn Products Refining Co.* v. *Eddy,* 249 U. S. 427, a regulation by the State Board of Health was sustained requiring proprietary foods imported into the State and sold in original packages to bear labels stating the names and percentages of the ingredients.

In *South Covington & Cincinnati Street Ry. Co.* v. *Kentucky,* 252 U. S. 399, a separate coach law for white and colored passengers was sustained.

In *Western Atlantic R. R.* v. *Georgia Public Service Commission,* 267 U. S. 493, a rule was sustained providing that switching service shall not be discontinued without the consent of the Commission, even as applied to interstate commerce.

Sixth.

This action was prematurely brought.

We repeat what has been said before. This division point has been located at Sapulpa ever since the railroad has been built. It was located voluntarily. In 1917, before the act of the legislature was passed, a proceeding

was instituted before the corporation commission to prevent the removal of the terminal to West Tulsa, because amongst other things it was an unhealthy place for the employees to live. A temporary order was obtained. The evidence of the plaintiffs in that case was introduced. Then came the act of the legislature. After that nothing further was done in that case, but the temporary order was left in force without any effort by the railroad company to have it set aside. The situation remained thus for ten years. Then the railway company, ignoring the order of the commission and ignoring the act of the legislature, started to move its division point and shops. The matter was brought to the attention of the commission and set down for hearing in January of this year. The railway company, instead of appearing at that time, filing an application and showing cause why it should be allowed to move, hurried into the federal court, got a temporary restraining order without notice and after a hearing obtained the interlocutory injunction. The orderly procedure would have been for the railway company to comply with the law of the State, to respect the order which had been made by the commission, and which had been in force uncontested for ten years. It might have obtained the relief which it desired. The commission, in its affidavit, states that it intends, if permitted, to give the case suitable consideration and to make such an order as right and justice may require. Having volun-

tarily located its shops and terminals at Sapulpa, having maintained them there since there has been a railroad, approximately thirty-five years, having complied with the temporary order of the commission without protest for ten years, the railway company would not have been damaged by pursuing the orderly course provided by the statute. Its cry of pain is emitted in advance of an injury.

The principle applicable is announced in *Prentis* v. *Atlantic Coast Line,* 211 U. S. 210, where the court held that the railroads should have exhausted their remedy in the state courts before seeking an injunction in the federal court.

Western Atlantic Railway Company v. *Public Service Commission of Georgia,* 267 U. S. 493, is even more directly applicable to this case. In that case the railway company filed its bill in the district court against the public service commission to enjoin the enforcement of an order requiring the railroad to furnish switching services on an industrial siding. A three judge court denied the application for a temporary injunction, and an appeal was taken to this Court. In that state there was a general order by the commission providing that facilities enjoyed by shippers under the law or rules of the commission, whether granted by voluntary action on behalf of the railway company or otherwise, should not

be discontinued without the consent of the commission. This court says, page 496:

> "The three-judge court refused the application, on the ground that Rule 14 had not been complied with. Rule 14 is a reasonable rule and the Commission was fully justified in refusing to sanction a discontinuance of service until a petition had been filed with the Commission and a showing made. The doubt which arises in our minds is whether the Public Service Commission, by its consent to a full hearing of the issue without a formal petition and an order based on the merits, did not waive the defect of a petition. *The action of the Company in discontinuing the service without a petition was arbitrary and defiant,* but the subsequent action of the Commission seems to have condoned the fault in such a way as to prevent our making it a reason for not looking farther into the issues now raised by the Company in its bill.
>
> "It is said that the requirement of the continuance of the service deprived the Company of its property without due process of law, in violation of the Fourteenth Amendment, because the service rendered by the sidetrack was much greater in out of pocket cost than the compensation. This can not be sustained. The service has been rendered for years. It was a voluntary arrangement, and under its statutory powers (Sec. 2664, Georgia Code, 1910) was made irrevocable by the Public Service Commission under Rule 14, except by consent of the Commission. The spur track was for a public purpose. *Union Line Co.* v. *C. & N. W. Ry. C.*, 233 U. S. 211. *The requirement that such a service should not be discontinued, without notice and hearing was clearly within the police power of the State. Chicago & Northwestern R. R. Co.* v. *Ochs*, 249 U. S. 416; *Lake Erie & Western R. R. Co.* v. *Cameron*, 249 U. S. 422; *Railroad Commission* v. *L. & N. R. R. Co.*, 148 Ga.

442. Even if the cost of the switching is more than what is received for it, we can not determine on any showing made by the Company that the switching does not work a benefit in the increased business that the Company gets, or may get, by reason of the added facilities furnished by the switching. The switch is a small part of the whole railway, and the mere fact that the switching may not be profitable by itself can not be held to be a confiscation of property, even if it involves a loss. See, *Fort Smith Light & Traction Company* v. *Bourland,* 267 U. S. 330.

"It seems to be the contention of the Company that, since 85 per cent of the business done on the side track is interstate commerce, the power to order its establishment or abandonment is vested in the Interstate Commerce Commission, and that the state commission is without authority in the premises. Such a claim is in the teeth of the Transportation Act of 1920, 41 Stat. 456, c. 91 Sec. 402, par. 22, which provides that the authority of the commission conferred by Sec. 402 over the extension or abandonment of interstate railway lines shall not extend to the construction of spur industrial or side tracks. See, *Railroad Commission* v. *Southern Pacific Co.,* 264 U. S. 331, 345."

The act of the Oklahoma Legislature is comparable to Rule 14 of the Georgia Commission, and the three-judge court should have refused the temporary injunction just as it was refused in the Georgia case, for the reason that the railroad had not availed itself of the method prescribed by the State. This Court recognizes that that was a proper rule, and, particularly, as it was a voluntary arrangement that had been in force for years, the commission had the power by the rule to prevent its discontinuance without a hearing. That is our case almost exactly.

This case was also called to the attention of the three judges in the court below, but apparently it had no more weight with them than the decision of this Court in the International and Great Northern case.

We have, therefore, in this case a temporary injunction granted by three judges, although there are two decisions of this Court directly in point; the International & Great Northern case, holding that the Texas statute was valid, and the Western & Atlantic case, holding that Rule 14 of the Georgia Commission was valid and must be complied with before relief could be sought in the federal court.

Seventh.

Imposing the burden of proof on the railway company is a valid provision.

The argument was made in the lower court that this provision renders the act invalid. On this point we content ourselves with citing *James-Dickinson Farm Mortgage Company et al.* v. *Carrie M. Harry,* decided by this Court January 10, 1927, not yet officially reported.

We respectfully submit that the decree of the lower court should be reversed.

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